No. 04-10632

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

KEVIN ERIC CURTIN,
Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA, D.C. No. 2:04-cr-00064-RCJ
The Honorable Robert C. Jones, *United States District Judge.*

PETITION FOR REHEARING EN BANC

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEVADA

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INTRODUCTORY STATEMENT

The United States of America respectfully submits that the panel decision in this case, filed on April 4, 2006 as *United States v. Curtin*, 443 F.3d 1084 (9th Cir. 2006) should be reheard en banc because it conflicts with a decision of this Court of Appeals, conflicts with the authoritative decisions of other United States Courts of Appeals, and involves a question of exceptional importance to the administration of justice. *See* Fed. R. App. P. 35(b)(1)(B).

STATEMENT OF THE ISSUE

Whether Rule 404(b) of the Federal Rules of Evidence permits the admission of stories involving sex between adults and children to prove intent where (1) arresting officers found the stories in the defendant's possession, (2) the indictment charged the defendant with traveling across state lines with intent to engage in a sexual act with a minor, in violation of 18 U.S.C. §2423(b), and (3) the only disputed issue at trial was whether the Defendant had the subjective intent to engage in sex with a minor.

STATEMENT OF THE CASE

Summary. A grand jury returned a superseding indictment on July 7, 2004, charging Defendant Kevin Eric Curtin with one count of traveling across state lines with intent to engage in a sexual act with a minor, in violation of 18 U.S.C. § 2423(b), and one count of coercion and enticement of a minor, in violation of 18 U.S.C. § 2422(b). A jury convicted Curtin as charged and the district court sentenced him to a five-year prison term followed by five years of supervised release. Curtin appealed, assigning error to the district court's admission of five of the 140 stories on his personal digital assistant (PDA) that was in his possession at the time of his arrest.

A divided Ninth Circuit panel reversed the conviction. The majority found the stories inadmissible character evidence. In a 73-page dissent, Judge Trott found that

the majority's decision conflicted with prior decisions of the Ninth Circuit, the Tenth Circuit, and the Supreme Court, and that the stories were relevant and admissible under Rule 404(b) to prove intent.

Factual Background. On February 11, 2004, Las Vegas Metropolitan Police Department Detective Michael Castaneda logged into an internet chat room labeled "ltgirlsexchat" using the screen name "Christy13" and holding himself out as a 14-year-old girl living in Las Vegas. Castaneda received a message from Curtin almost immediately. They "chatted" for several hours and exchanged photographs. Castaneda sent Curtin a photograph of a female police officer taken when the officer was 14 years old.

Curtin told Castaneda's "Christy" persona that he was 42, divorced, and living in Anaheim, California. He told Christy he was traveling to Las Vegas and invited her to attend a show on Sunday, February 15. Christy agreed. Curtin discussed sex with Christy during their electronic dialog. He graphically described the sexual acts he wanted them to engage in. He instructed Christy to pose as his niece and stressed they must never get caught. They agreed to meet in the bowling alley of a Las Vegas casino at 2:00 p.m. on Sunday, February 15. The graphic sexual dialog-by-computer continued the following day.

On that Sunday, the police officer whose picture was sent to Curtin waited in the bowling alley as a decoy, dressed in the clothes that Christy told Curtin she would wear. Other law enforcement officers were also present. Curtin arrived at 1:45 p.m. and walked past the decoy officer twice, looking at her each time. He exited and stood outside the bowling alley, where he used his PDA. After a casino security guard asked Curtin for identification, Curtin left the bowling alley area. He came back a few minutes later. He looked around and returned to the area where the decoy officer was sitting. He gradually approached her and when he stopped behind her, she turned and said "hi" to him.

Curtin then left the bowling alley and started getting into a van. Law enforcement officers asked him for identification and detained him. Curtin waived his *Miranda* rights and told them he had driven to Las Vegas and went to the bowling alley to meet a female friend he met on the internet. He admitted to using the screen name and email address, and said he often enters chat rooms and "role play[s]" in "daddy/daughter" type conversations. He said he expected Christy to be a 30-to-40-year-old woman pretending to be a girl. Police arrested Curtin, searched his van and hotel room, and seized his PDA and laptop. The PDA contained over 140 stories describing adults having sex with children. The laptop contained a list of chat room

channels Curtin had accessed, and photographs of girls whose names matched some of those in his "chat" list.

District Court Adjudication. Curtin moved in limine to preclude admission of the stories found on his PDA. The district court denied the motions and on the second day of trial the government offered two of the stories to show modus operandi, intent, preparation, and knowledge. The district court admitted the stories over Curtin's objection. The engineer who extracted the stories from the PDA testified that both stories described a father having sex with his young daughter and the daughter's enjoyment of the experience. However, when the government offered a third story, the district court stopped the questioning.

The court allowed the government to ask general questions such as whether all the stories concerned sex between a minor and an adult, but conditioned admission of further stories on ties to Curtin's intent, knowledge, preparation, or modus operandi. The government argued that 19 of the stories showed general intent, modus operandi, preparation, and knowledge because the stories used language similar to that used by Curtin in his email to Christy. The government relied on *United States v. Allen*, 341 F.3d 870 (9th Cir. 2003), a case involving violation of federally protected rights on the basis of race and religion, in which this Court upheld the district court's

admission of Nazi-related literature and photographs of the defendants posing with swastikas, offered to show the specific intent of racial animus.

The following morning, Curtin renewed his objection, arguing the stories demonstrated propensity and were unfairly prejudicial. The district court held that if the government could cite a part of the story that related to one of the permissible purposes under Fed. R. Evid. 404(b), the court would admit the entire story to show general intent. Ultimately the district court admitted five stories into evidence with a detailed limiting instruction. The jury convicted Curtin on both counts.

Ninth Circuit Panel Adjudication. Curtin appealed, arguing the five stories were inadmissible character evidence and introduced to show propensity in violation of Rule 404(b). The government argued alternatively that the stories were admissible (1) regardless of Rule 404(b) because they were inextricably intertwined with the charged crimes, and (2) under Rule 404(b) to prove Curtin's intent.

A divided panel reversed the conviction and remanded for a new trial. The majority rejected the government's contention that the stories were "inextricably intertwined" with the offense. 443 F.3d at 1090. The majority also found the stories inadmissible under Rule 404(b), relying on *Guam v. Shymanovitz*, 157 F.3d 1154 (9th Cir.1998). *Shymanovitz* involved stories admitted under Rule 404(b) to support the scienter element of a general intent crime. Here, the panel majority found the

government's reliance on *Allen* insufficient on four grounds: (1) the challenged evidence in *Allen* included more than reading material; (2) the reading material in *Allen* was presumably non-fictional; (3) as in *Shymanovitz*, the challenged evidence was extremely prejudicial; and (4) the evidence in *Allen* may have been admissible as "inextricably intertwined." 443 F.3d at 1093-94. The panel majority found *Shymanovitz* controlling and held the district court abused its discretion in admitting the stories.[1/]

Judge Trott wrote a 73-page dissenting opinion focused on Curtin's claimed lack of intent, i.e., that he was merely "role-playing" and expected to meet an adult woman who had also been "role-playing" as a young girl. Thus, Judge Trott explained, "the only disputed issue in this case would be Curtin's subjective intent: did he intend to hook up with a 30 to 40 year-old woman who liked to pretend she was a child having incestuous sex with her daddy, or with a pubescent minor?" 443 F.3d at 1098. Judge Trott noted defense counsel's remark in his opening statement that the charges required the jury "to look at the thoughts." *Id.* at 1099.

Because Curtin's subjective intent was the central fact issue at trial, Judge Trott found the stories admissible under Rule 404(b) "for two equally appropriate purposes: (1) to prove that Curtin harbored the subjective intent made unlawful by law, and (2)

[1/] The panel opinion rejected Curtin's other claims.

to rebut Curtin's defense that the daughter in his daddy/daughter sexual fantasy was an adult pretending to be a child." *Ibid.* The dissenting opinion notes that "[n]ot a single story on Curtin's PDA was about daddy/daughter role playing with adults," rather, they were "all built around daddies having sexual relations with *child* daughters, not adults, and the content of the stories parallel Curtin's email exchanges with his target." *Ibid.* (Emphasis in original.)

The dissenting opinion compares excerpts from the stories and Curtin's chat room statements to show material similarities. It cites *Huddleston v. United States*, 485 U.S. 681, 685 (1988), for the proposition that "[e]xtrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." The dissent emphasizes that the district court "did not admit all 140 stories, only five, taking great care in the exercise of its discretion to restrict their use to the main issue and to eliminate possible undue prejudice." *Id.* at 3707.

Judge Trott strenuously disagreed with the panel majority's reliance on *Shymanovitz*, because Curtin's offenses required specific intent while Shymanovitz's did not, and because Shymanovitz's defense did not involve intent or state of mind, whereas the parties disputed Curtin's intent: whether he intended to meet an adult or

a child. Moreover, the dissent notes that Curtin had the stories in his possession when he entered the bowling alley, whereas the defendant in *Shymanovitz* did not have the materials in his immediate possession at the time of the offense.

Judge Trott's dissent explained that the Court had "recognized the limited reach of *Shymanovitz*" in *Allen*. 443 F.3d at 1104. He noted that because the Court "perceived in *Allen* the difference between cases involving specific intent and those that do not," it had no trouble distinguishing *Shymanovitz*. *Id.* at 1105.

REASONS FOR GRANTING THE PETITION

The panel's decision–holding the text stories inadmissible under Rule 404(b) to prove intent in a specific intent case–directly conflicts with this Court's decision in *Allen*, and is inconsistent with the Court's reasoning in *Shymanovitz*. It also conflicts with decisions of the Supreme Court, Eighth Circuit and Tenth Circuit.

The panel majority erred in finding that the district court abused its discretion by admitting the stories to show intent under Rule 404(b). The decision contravenes precedent and applies an erroneous standard of review. The majority expands *Shymanovitz* to specific intent crimes, directly conflicting with *Allen*'s consideration of that issue.

Additionally, the panel majority's decision conflicts with decisions of federal appellate courts on the admissibility of extrinsic evidence to prove intent under Rule 404(b).

I. THE STORIES WERE ADMISSIBLE UNDER RULE 404(b) TO PROVE CURTIN'S INTENT.

This Court construes Rule 404(b) as a "rule of inclusion." *United States v. Ayers*, 924 F.2d 1468, 1472 (9th Cir. 1991); *Heath v. Cast*, 813 F.2d 254, 259 (9th Cir. 1987), *cert. denied*, 484 U.S. 849 (1987). Evidence of other crimes or acts is admissible under Rule 404(b) "except where it tends to prove only criminal disposition." *United States v. Sangrey*, 586 F.2d 1312, 1314 (9th Cir.1978) (internal quotation and citation omitted). Rule 404(b) permits evidence of other acts for other purposes, however, including proof of intent. Thus, under 404(b), the government may not introduce evidence that a person possessed stories of adults having sex with minors to prove that he is the kind of person who would have sex with minors. On the other hand, if there is evidence that a person traveled interstate, the government may introduce the very same evidence to prove that the person's intent in traveling interstate was to have sex with a minor.

In *Shymanovitz*, the government charged the defendant with sexual assault, and he claimed the alleged incidents simply did not occur. Thus, unlike in this case,

subjective intent was neither an element of the offense charged in *Shymanovitz* nor an issue raised in the defense of that charge. The Court in *Shymanovitz* recognized that critical factor in rejecting the government's effort to introduce evidence under Rule 404(b) to show the defendant's intent. This Court stated that for Shymanovitz's charged offenses, "it is the character of the touching that is at issue, *not the purpose of the intentional toucher.* Accordingly, the government's current and sole justification for admitting the evidence goes ... to the proof of an element immaterial to the offense." 157 F.3d at 1158 (emphasis added).

The Court further emphasized this distinction in *Allen.* In rejecting the defendants' reliance on *Shymanovitz*, this Court stated, "Key to our reasoning [in *Shymanovitz*] was the fact that the testimony ... was not relevant to proving any of the elements of the crime for which the defendant was convicted[, but i]n contrast, the skinhead and white supremacy evidence here was relevant to proving the element of intent in both [of the charged offenses.]" *Allen*, 341 F.3d 877 n.25. The panel majority's decision here undercuts both *Allen* and *Shymanovitz.*

In this case, as in *Allen*, the defendant's subjective intent is an element of the charged offense. Moreover, because the defendant here does not dispute that he engaged in the on-line chat sessions and traveled across state lines, but argues only that he did not act with the requisite intent to make these activities criminal, the

defendant's subjective intent was the only disputed issue at trial. The panel majority's application of Rule 404(b) in this situation misapplies *Shymanovitz*, directly conflicts with *Allen*, and cannot be squared with the obvious probative force of the evidence on the question of the defendant's intent in traveling interstate.

II. THE PANEL MAJORITY'S DECISION CONFLICTS WITH OTHER FEDERAL APPELLATE DECISIONS ON THE ADMISSIBILITY OF TEXT STORIES TO PROVE INTENT UNDER RULE 404(b).

The United States Supreme Court held, in *Huddleston v. United States*, 485 U.S. 681, 685, 108 S.Ct. 1496 (1988), that "extrinsic act evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." The sole disputed issue in this case was Curtin's intent. The panel majority's decision contravened *Huddleston* by holding the text stories–stories Curtin located, downloaded and carried with him–inadmissible to prove his intent to engage in sexual acts with a minor.

In *United States v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999) (per curiam), the defendant made a bomb threat, and the case turned on whether the threat was real or merely "political hyperbole." The district court allowed the United States to admit into evidence "literature espousing hate and violence" and "Nazi propaganda" found in the defendant's home. The Tenth Circuit rejected the defendant's claim of

evidentiary error, concluding that "[w]hen the defendant offers lack of intent as a defense, even though the government does not have to prove subjective intent as an element of the offense, the circumstances surrounding the making of the calls becomes relevant. The evidence offered clearly was probative of defendant's state of mind and tends to counter his allegation of benign purpose." *Viefhaus*, 168 F.3d at 397. The panel's decision clearly conflicts with the Tenth Circuit's decision in *Viefhaus*. The reason for admitting the stories in Curtin's case was even stronger because, unlike the defendants' subjective intent in *Viefhaus*, Curtin's subjective intent was an element of the charged offenses. *See Viefhaus*, 168 F.3d at 397.

In *United States v. Magleby*, 241 F.3d 1306 (10th Cir. 2001), the defendant was charged with burning a cross in the front yard of an African-American family. During trial, the district court allowed the government to introduce the racist lyrics of a song the defendant often sang. On appeal, the Tenth Circuit held that the lyrics, and the defendant's familiarity with them, "are probative of his racial animus in burning the cross." *Magleby*, 241 F.3d at 1319. Further, because the United States had to prove the defendant's specific intent to "oppress, threaten or intimidate" the victims as an element of charged offense, and the context was critical "in determining whether a true threat has been made." *Id.* The Court found that the necessity of demonstrating the context of the threat rendered the song lyrics intrinsic to the "oppress, threaten or

intimidate" element of the crime with which he was charged. *Id.* So it is here. Under the framework of *Viefhaus* and *Magleby*, the text stories Curtin carried with him when he went to meet Christy were clearly admissible to show his intent. Thus, the panel majority's decision conflicts with those Tenth Circuit decisions.

The panel majority's decision also conflicts with the Eighth Circuit decision in *United States v. Vik*, 655 F.2d 878 (8th Cir. 1981). In *Vik*, the government charged the defendant with transporting minors across state lines for purposes of prostitution. The defendant's intent in transporting the minors was an element of the crime. The Eighth Circuit found that because the question of the defendant's intent in transporting the girls "raised a material issue," extrinsic evidence regarding his statements and actions with others "was relevant on the issue of [his] intent." *Vik*, 655 F.2d at 881.

Thus, the panel majority's decision clearly conflicts with decisions of the United States Supreme Court, the Eighth Circuit and the Tenth Circuit, all of which have held extrinsic evidence admissible to prove a defendant's intent. The extrinsic evidence, as is clear under the cases from these other Courts, becomes even more relevant where, as here, intent is not only an element but also the only disputed material fact at trial.

CONCLUSION

For the reasons stated, the United States urges this Court to grant this petition and hear the appeal in this case *en banc*.

Dated: this 16th day of May, 2006.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I HEREBY CERTIFY, pursuant to Circuit Rules 35-4 and 40-1, that the attached Petition for Rehearing En Banc is:

X Proportionately spaced, has a typeface of 14 points or more and contains 3,727 words (petitions and answers must not exceed 4,200 words);

and

X In compliance with Fed. R. App. P. 32(c) and does not exceed 15 pages.

Dated: May 16, 2006

Nancy Koppe, AUSA
United States Attorney's Office
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused two (2) true and correct copies of the foregoing Petition for Rehearing En Banc to be served this 16th day of May, 2006, by United States Mail, postage prepaid, on:

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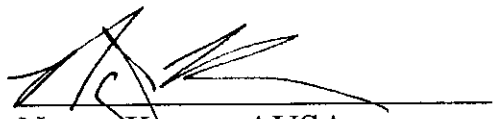

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CASE NO. 04-10632

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee

v.

KEVIN CURTIN,

Defendant/Appellant.

_____/

ON APPEAL OF JUDGMENT OF CONVICTION FROM

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEVADA

APPELLANT KEVIN CURTIN'S RESPONSE TO GOVERNMENT'S PETITION FOR REHEARING EN BANC

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18 USCS 2423 (b)

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INTRODUCTION

The majority of the Curtin panel properly reversed the judgment and conviction of Kevin Eric Curtin based upon authoritative decisions in this Circuit. The facts of this case follow rather than conflict with the decisions in this Circuit. In addition, the opinion does not conflict with other authoritative decisions, nor does it conflict with United Supreme Court case law. Moreover, this case does not involve a question of such exceptional importance to the administration of justice. Therefore a Rehearing En Banc is not required.

STATEMENT OF THE ISSUES INVOLVED

This case involved the improper admission of 5 highly prejudicial stories involving incest, so inflammatory that the trial court itself could not read them all prior to their introduction. In addition, the government was allowed to argue that the total number of stories was 140. The Curtin majority held that the stories were not inextricably intertwined with the act, and that these stories were not similar acts of the defendant. The majority correctly held that in its Rule 404(b) analysis the issue is whether, "There is similarity between the possession of the stories (5) and the crime with which Curtin is charged."

The reliance by the dissent on **US v. Allen**, 341 F 3d 870(2003) was therefore misplaced because in **Allen**, (1) the pictures of the defendants ***actively participating*** in acts of hatred, standing in front of a swastika that they set on fire, involved more than the possession of reading material, (2) there was no indication that the reading material, unlike in **Shymanovitz** was fiction, (3) the evidence in

issue, as in **Shymanovitz**, was highly prejudicial, and (4) it was possible that the evidence in **Allen** would have been admissible under the "inextricably intertwined" exception. Likewise, the Curtin majority correctly ruled that Mr. Curtin's active participation in the emails on his computer to alleged young girls would be admissible on the issue of his intent, whereas the mere possession of lawful literary articles or stories would not be admissible.

STATEMENT OF THE CASE

The defendant, Kevin Eric Curtin, was charged in a two count superseding indictment of traveling across state lines with intent to engage in a sexual act with a minor in violation of 18 USCS 2423 (b), and with violation of 18 USCS 2422 (b), use of an interstate facility to attempt to persuade a minor to engage in sex. The court spent much time going back and forth deciding whether or not to introduce evidence of the 140 fictional stories he possessed on his Palm Pilot when he was arrested. The trial court could only read one of the stories, but allowed five stories to be admitted, but also allowed the jury to know that Curtin had 140 stories of incest on his PDA (personal digital assistant.) The court recognized the overwhelming prejudice, but allowed them in on the issue of intent, with a limiting instruction even though he had not read all of the stories and therefore could not be adequately informed to make a four step 404(b) analysis. See, **United States v. Spillone**, 879 F.2d 514, 518 (9th Cir. 1989).

Mr. Curtin repeatedly argued that the stories were propensity evidence which were far more prejudicial than was the literature in **Shymanovitz**, P 22, LL 16-20. Mr. Curtin likewise cited, as did the Curtin majority, the trial court's

concerns about the overwhelming prejudice, at P. 3677. The majority further recognized the prejudice factor in its opinion in evaluating the reasons for reversal under **Shymanovitz**.

The government states that only five stories were admitted, however, the jury was told in essence that there were 140 stories like the five, so the jury was made aware not just of five stories, but the existence of 140 incestuous stories.

Finally, the Curtin majority found no error with the Emails taken from the hard drive of the desk computer, as acts of the defendant to show his intent.

ARGUMENT

THE MAJORITY CORRECTLY APPLIED 404(b) AND SHYMANOVITZ, AS WELL AS THE CASE OF VIZCARRA-MARTINEZ

The Curtin majority correctly noted that the issue is whether reading material at issue was admissible under 404(b). In **Shymanovitz** the court held that possession of lawful magazine articles failed to constitute a Rule 404(b) "bad act" ie. That possession of lawful reading material was not similar to actual criminal conduct. Indeed, possessing written stories about criminal conduct is not the same as committing the crimes described.

THIS COURT IN SHYMANOVITZ RECOGNIZED INTENT, SO AS NOT TO DISTINGUISH SHYMANOVITZ FROM ALLEN, WHEN BOTH CASES ARE READ TOGETHER THEY ARE CONSISTENT

The stories were on the palm pilot and were never alleged to have been a part of the crime. In fact Curtin had not read all of the stories. The propensity

evidence did not show that he engaged in sex with minors, and therefore would not show that he intended to engage in sex with minors. As stated in **Shymanovitz**, at 1158-59:

> "At the very most, Shymanovitz's possession of the sexually-explicit magazines tended to show that he had an interest in looking at gay male pornography, reading gay male erotica, or perhaps even, reading erotic stories about men engaging in sex with underage boys, and *not* that he actually engaged in, or even had a propensity to engage in, any sexual *conduct* of any kind. In any event, propensity evidence is contrary to "the underlying premise of our criminal system, that the defendant must be tried for what he did, not who he is." *United States v. Vizcarra- Martinez*, 66 F.3d 1006, 1014 (9th Cir. 1995) (internal citations omitted)." .

The defense made a proper objection under **Shymanovitz**, and challenged the admission of the stories several times. Likewise, in his appeal and argument, he properly raised **Shymanovitz** and urged attendant prejudice. To cite **Shymanovitz**, at 1159-60:

> If introduced to show "knowledge" or "intent," the prior bad act must be *similar* to the offense of which the defendant is charged. *See, e.g., United States v. Vizcarra-Martinez*, 66 F.3d at 1014 (finding possession of drug not to be admissible as proof of intent under Rule] 404(b) due to lack of similarity to charged offense of drug manufacture). Here there is simply no doubt that a wide gulf separates the act of *possessing* written descriptions or stories about criminal conduct from the act of *committing* the offenses described. Because the contents of the four magazines and the text of the two articles were not relevant to Shymanovitz's intent, or to any other material element of the sexual misconduct charges, and did not constitute "bad act" evidence, the trial court abused its discretion when it admitted the challenged evidence.

Shymanovitz was charged with molesting minors. In his trial, the government was allowed to mention articles that consisted of presumably fictional tales and described two couples engaging in sexual conduct: the first, a father and

son; the second, a priest and a young boy. The court directly mentioned how these articles would not bear on a defendant's intent, at 1158:

> There are even more fundamental reasons why the "Stroke" magazines and the fictionalized articles were inadmissible. The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would ***intentionally*** (emphasis added) engage in the conduct described.

On the case at hand, the Curtin majority understood and agreed, specifically mentioning this excerpt in footnote 2, "Wholly apart from its prejudicial effect." The Curtin majority correctly decided that these stories, admitted as substantive evidence of guilt, was an abuse of discretion. Additionally, the majority, in comparing **Shymanovitz** stated, at 3685, "the evidence at issue in this case, and in **Shymanovitz**, was extremely prejudicial."

The instructions by the trial court, dealing with intent, actually invited the jury to ponder whether, due to the stories, "He practiced in this alleged conduct methodology consistent with literature that he had in his possession" Thus, the intent instruction became a suggestion of unproven and uncharged extraneous acts, and that his mere possession of these articles could mean that he practiced it! There is nothing so unique or distinctive about these lawful stories, however repugnant, to merit this instruction. Even the trial court was concerned that the charge may ***"overemphasize"*** this evidence. Appellant's Brief P 16 L 13-19, and even said that after the first story, it was redundant and also potentially biasing. P 17 LL 13-16. As stated in **Shymanovitz**, at 1159: "The physical conduct in which **Shymanovitz** allegedly engaged could hardly be construed as either distinctive or remarkable in the universe of sexual offenses against minors."

Thus, intent was adequately addressed, and specifically mentioned in **Shymanovitz**; there is not such a wide distinction in results as the dissent suggests here. In **Allen**, the defendant's intent was allowed to be proven by pictures of the defendants' involvement in Nazi acts, Heil Hitler poses, posing and burning a large swastika. These acts could even have been considered inextricably intertwined. Additionally, the majority pointed out that there was no indication that the acts in **Allen**, supra. were fictional. Similarly, the literature "at issue in this case, and in **Shymanovitz**, was extremely prejudicial fiction," Curtin, at 3685.

SHYMANOVITZ CONFORMS WITH THE REST OF 9TH CIRCUIT CASE LAW

The government fails to recognize that there is ample precedent dealing with intent crimes even with illegal acts, much less the possession of innocent articles in dealing with 404(b) evidence. In **United States v. Vizcarra-Martinez**, 66 F.3d 1006 (1995) the court was dealing with an illegal act of the possession of methamphetamine and a charge of possession and conspiracy to wrongfully possess a listed chemical knowing and having reasonable cause to believe that it would be used to manufacture methamphetamine. The police had stopped the Defendant's car and discovered a large quantity of hydriodic acid. Defendant appealed his convictions contending that the trial court erred in admitting evidence that he possessed a small quantity of methamphetamine at the time of his arrest. The court reversed and held that although the prosecution had introduced sufficient evidence to convict defendant, the trial court had abused its discretion under R. 404(b) and had committed reversible error because the small amount of illegal drugs found on defendant was "other act" evidence that had no connection

to his knowledge, ***intent***, motive, or plan to engage in a conspiracy or possess a listed substance to produce methamphetamine.

To reverse this case, thus, would not only conflict with **Shymanovitz**, but would also conflict with other well reasoned 9th Circuit cases.

THE HUDDLESTON CASE DOES CONFLICT WITH THIS CASE

In **Huddleston v. US**, 485 U.S. 681 (1998) the United States District Court for the Eastern District of Michigan allowed the Federal Government, under Rule 404(b), to introduce evidence of an allegedly similar act of the accused--his sale, for $ 28 apiece, of 38 televisions which the accused had obtained from the same person who had provided the tapes to the accused--on the ground that such evidence had clear relevancy to the accused's knowledge with respect to the tapes. These were clearly ACTS of the defendant, selling ridiculously cheap television sets, and the Supreme Court held that these acts could be admitted as to whether he knew he was dealing in stolen tapes. Factually, this case is not dealing with illegal acts, but the possession of lawful stories; "the mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would ***intentionally*** (emphasis added) engage in the conduct described." **Shymanovitz**, at 1158. Mr. Curtin was not committing any acts, whereas Huddleston was fencing television sets ***to the same person***, so that his prior sales of stolen tv sets was admissible on whether here, he was knowingly selling stolen merchandise, since there was evidence that he had "**committed** (emphasis added) the similar act." **Huddleston**, summary. Clearly, Huddleston does not conflict and control this case, nor does it conflict and control over **Shymanovitz**, nor does it control over **Vizcarra-Martinez**.

The evidence in Mr. Curtin's case was propensity/character evidence, not bad acts. The Supreme Court recognized in **Huddleston** that the threshold inquiry a court must make before admitting similar acts evidence under Fed. R. Evid. 404(b) is whether that evidence is probative of a material issue other than character. To cite Led Hn6, in **Huddleston**:

"In a federal criminal trial, the Federal Government may not place before the jury a litany of potentially prejudicial similar acts that have been established or connected to a defendant only by unsubstantiated innuendo, because extrinsic-acts evidence that might adversely reflect on the actor's character is admissible under Rule 404(b) of the Federal Rules of Evidence only if the evidence is relevant; in the Rule 404(b) context, similar-acts evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor.

Huddleston, thus stands for the proposition that the Emails would be admissible, but the possession of the literature would not be admissible.

THE CASES IN THE OTHER CIRCUITS DO NOT CHANGE THE RESULT HERE

In **United States v. Viefhaus,** 168 F.3d 392 (10th Cir. 1999) the Agents seized not only literature espousing hate and violence and Nazi propaganda, a cache of weapons, books on making bombs, chemicals and other materials that could easily be converted into high-powered pipe bombs, and a list of facilities in the Tulsa area occupied by Jewish, Muslim, and Native American groups, as well as various federal agencies. These items are far more specific and specifically tailored to his intentions when taken as a whole a substantial amount of expenditure is required here it would seem. These items are more than the mere

downloading articles that speak to incest. These items would show it was more likely that his threats were serious, and therefore these facts do not create a conflict of circuits. Unlike the possession of a cache of weapons, bomb making books, chemicals and other materials that could easily be converted into high-powered bombs, and lists of facilities, is monumentally different from "The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would ***intentionally*** (emphasis added) engage in the conduct described. **Shymanovitz**, 1158."

In **US v. Magleby**, 241 F.3d 1306 (9th Cir. 2001), right before a Defendant burned a cross, he was UTTERING words from a song involving racism, so well that he had memorized them. There was also evidence that he was going to burn a cross somewhere, and that someone suggested a "crackhead." These facts are distinguishable then, because this was not the mere possession of literature, music, but the actual uttering of the racial nature. These were his actions, just as the emails were Mr. Curtin's actions. Affirmative statements are different from the mere possession of articles. This is not a case where Mr. Curtin stated that he was going to find a minor with whom to have sex, whereas Magelby was seeking to burn a cross, and inextricably intertwined with the burning was the singing and otherwise uttering the nigger, nigger, get out songs by Screwdriver. It is a stretch to say that the holdings based on the facts in **Magelby** require a complete turnaround of the majority in the instant case, and break with **Shymanovitz** and **Vizcarra**.

Finally, **U.S. v. Vik**, 655 F.2d 878 (8th Cir. 1981) did not deal with mere possession of material, but acts of the defendant. Witness Lambert testified that Vik asked her ***to go to Chicago to be a prostitute for him***. She said that he also

showed her pictures of ***his "working girls.***" Witness Day testified that Vik also showed to her pictures of girls who he said worked for him. Day also testified that Vik said he was a "pimp" in Chicago. Witness Reed testified that he, too, was shown pictures of girls by Vik and ***that Vik had spoken of being a "pimp."*** This is a far cry from the fictional stories in **Shymanovitz** and in this case.

SHYMANOVITZ HAS BEEN CITED IN OTHER CIRCUITS

Shymanovitz has been cited by the Seventh Circuit in **United States v. Holt,** 170 F.3d 698 (7th Cir. 1999), recognizing and reaffirming that the possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described. It has been cited by this circuit in **Hart v. Gomez,** 174 F.3d 1067, at 1073 (9th Cir.1999), where a defendant's statement that nothing is wrong with incest should not have been admitted, since a person should be tried for what he did rather than who he is. It has been cited in a civil medical malpractice case in **Baker v. Lane County,** 33 F. Supp. 2d 1291 (D.C. Ore. 1999). It has also been cited in the D.C. Circuit in **United States v. King,** 347 U.S.App.D.C. 53 (D.C 2001), holding that the admission of a knife in the trunk was error where the defendant was charged with felon in possession of a firearm, although harmless. Thus, **Shymnovitz** is good law, not only in this circuit, but others. It controlled this case, as correctly pointed out by the majority.

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CONCLUSION

There is no real conflict with the three cases in other circuits, cited by the government, based upon the facts of those cases. Likewise there is no break with the Supreme Court in the **Huddleston** case, dealing with specific illegal acts with the same person. Therefore rehearing en banc is not required because this is not a case that constitute a question of exceptional importance to the administration of justice. The Ninth Circuit's **Allen** case was well recognized and considered by the majority, and its result is not in conflict. In Allen, the defendants were active participants in Nazi conduct, and like the other case brought up by the dissent in this case and cited by the government in their petition, there was active conduct of the defendants. There is no conflict within this circuit.

It should also be noted that trial court went back and forth on this issue. The trial court did not even understand what the government had in mind, saying that he thought that the snippets WERE going to be read (P 12 LL 21-25). He said that he was going to let the entire story in on "***general intent.***" (P 13 LL2-5). The court, after considering the issue overnight, also was concerned about the "overwhelming prejudice versus the purpose." (P 13 LL LL 14-16), that the stories had "a tendency to overwhelm you and overwhelm the jury." (P 13 LL 17-20). He virtually predicted reversal. When he indicated his intent to give a limiting instruction, he was at the same time concerned that by giving that type of instruction, it may ***"overemphasize"*** this evidence (P 16 L 13-19), and even said that after the first story, it was redundant and also potentially biasing (P 17 LL 13-16).

More importantly there is no proof that the defendant even read the stories. Instead he admitted, he skimmed a few. Indeed, the trial court correctly predicted

this reversal, and the Curtin majority opinion is on all fours with 9th Circuit case law.

The attempts to pry this case from **Shymanovitz** based upon this case being a specific intent act is exaggerated. Indeed the **Vizcarra-Martinez** case was an intent crime as well, and illegal possession of methamphetamine admitted to show intent that he possessed with intent or having reason to believe it would be used for methamphetamine production was reversible error. It would have been more connected to show intent and knowledge than Mr. Curtin's possession of the 140 articles.

As to the Supreme Court case of **Huddleston**, this case does not save the government's position so as to deem the majority incorrect in this case. Indeed the majority correctly found the emails to be admissible as Curtin's acts. The majority found that there was admissible evidence the government could use. There being no question of exceptional importance to the administration of justice, the rehearing en banc request should be denied.

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Respectfully submitted,

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